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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JUAN GUSTAVO ROBLES-ALEJO, Defendant and Appellant.	A132532 (San Mateo County Super. Ct. No. SC071953B)

Amendments to Penal Code section 4019, effective April 4, 2011, and operative October 1, 2011 (hereafter, April 2011 amendments),[1] increased the amount of conduct credits certain felons could earn for the time they spent in presentence custody, but only after the operative date. Appellant Juan Gustavo Robles-Alejo argues that equal protection principles require retroactive application as well.

While this appeal was pending, our Supreme Court decided *People v. Brown* (June 18, 2012, S181963) ___ Cal.4th ___ [12 C.D.O.S. 6697] (*Brown*). *Brown* holds that prospective-only application of 2009 amendments to section 4019 did not violate equal protection. We find *Brown* dispositive of Robles-Alejo's equal protection challenge here.[2]

[1] (Stats. 2011, ch. 15, § 482, as amended by Stats. 2011, ch. 39, § 53; all statutory references are to the Penal Code unless otherwise indicated.)

[2] Our decision is also consistent with two recent published Court of Appeal decisions on this same issue. (*People v. Borg* (2012) 204 Cal.App.4th 1528 (*Borg*); *People v. Olague* (2012) 205 Cal.App.4th 1126 (*Olague*).)

I. BACKGROUND

In October 2010, Robles-Alejo was charged by information with felony sexual penetration of an unconscious victim (count 1; § 289, subd. (d)) and misdemeanor sexual battery (count 2; § 243.4, subd. (e)(1)) committed in June 2010. Robles-Alejo pled no contest to both charges. In May 2011, he was sentenced to the low term of three years on count 1 and to time served on count 2, and he was ordered to register as a sex offender pursuant to section 290. The court awarded him 489 days in presentence custody credits, representing 326 days of actual custody and 163 days of conduct credit (2:1 credit) pursuant to the then operative version of section 4019. Robles-Alejo did not contest the calculation of his presentence custody credits in the trial court. In June 2011, he appealed his conviction and sentence based on an alleged trial error, and the trial court granted him a certificate of probable cause to pursue that claim. On appeal, he raises only an equal protection claim related to his conduct credits.

II. DISCUSSION

A. *Section 1237.1*

We must first address the question of whether Robles-Alejo's equal protection argument is barred by section 1237.1 because it challenges the calculation of his presentence custody credits, and Robles-Alejo did not first raise the issue in the trial court. The People argue that Robles-Alejo may not raise this argument for the first time on appeal. They do not dispute that, assuming Robles-Alejo's equal protection argument is correct, the court imposed an unauthorized sentence and that such a sentence generally is not subject to the forfeiture rule but may be corrected at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 348–349 & fn. 15 (*Karaman*); *Wilson v. Superior Court* (1980) 108 Cal.App.3d 816, 818–819 [sentence that awarded unauthorized presentence custody credits was an unauthorized sentence subject to correction at any time].) However, they argue that section 1237.1 specifically bars any appeal based on miscalculation of presentence custody credits unless the issue has first been presented to the trial court.

Section 1237.1 provides, "No appeal shall be taken by the defendant from a judgment of conviction on the ground of an error in the calculation of presentence

custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction of the record in the trial court." We conclude section 1237.1 applies only to an alleged error in the calculation of credits that is based on factual or arithmetical mistakes that can be corrected through ministerial review and not to a constitutional challenge to a credit statute such as the one before us.

In *People v. Acosta* (1996) 48 Cal.App.4th 411 (*Acosta*), the court narrowly construed the language of section 1237.1 to conform to legislative intent and held the statute does not bar a credit claim raised for the first time on appeal if the appeal also raised other issues. The court first held that the relevant statutory language was ambiguous. "Section 1237.1 provides '[n]o appeal' shall be taken 'on the ground of an error in the calculation of presentence custody credits, unless the defendant first presents the claim in the trial court at the time of sentencing' or at a later time if the mistake is discovered 'after sentencing.' . . . The statute can be read to prohibit the filing of the notice of appeal if the sole issue is the propriety of the calculation of presentence credits. On the other hand, the statutory provision can be read to prohibit a defendant from ever presenting a presentence credit issue on appeal without first raising the question in the trial court . . . ." (*Acosta*, at p. 421.) The court then examined legislative intent to resolve the ambiguity. It concluded that the legislative intent was to "promote judicial economy by avoiding the utilization of the formal appellate process for a minor ministerial act." (*Id.* at pp. 422–423.) The statute was enacted in part in response to *People v. Fares*, which states, "[T]he calculation of custody credits in the ordinary case is little more than a ministerial review of the record and an arithmetic calculation. . . . [¶] . . . [W]e consider it not the proper function of the Court of Appeal to engage in this business of correction of clerical errors . . . ." (*People v. Fares* (1993) 16 Cal.App.4th 954, 959.) *Fares* held that the proper means of challenging a miscalculation of credits procedure was to file a motion for correction of the sentence in the trial court, a motion that could be filed at any time. (*Ibid.*) Based on the legislative history and on *Fares*, the *Acosta* court concluded that the Legislature only intended to bar an appeal that *solely* raised an issue related to the

miscalculation of credits, which resulted in the "utilization of the formal appellate process for a minor ministerial act." (*Acosta*, at pp. 422–423.) "When the only issue to be raised on appeal involves a matter such as presentence credits, the Legislature's determination that the issue should first be presented in the trial court makes sound economic sense" because the expenditure of public funds on preparation of an appellate record and appointment of appellate counsel may be avoided. (*Id.* at pp. 426–427.) "However, when there are other issues which are to be litigated on appeal, the economic good sense . . . no longer exists." (*Ibid.*)

By parity of reasoning, we conclude as a matter of statutory interpretation that section 1237.1 does not apply to a *constitutional* challenge to the validity of a statute governing the award of presentence custody credits. Section 1237.1 provides "[n]o appeal shall be taken . . . on the ground of an error in the calculation of presentence custody credits . . . ." (§ 1237.1.) The phrase "error in the calculation of presentence custody credits" is ambiguous. The statute can be read to refer to any legal or factual error that led to an erroneous award of presentence custody credits to the convicted person. On the other hand, the statute can be read to refer to a miscalculation of credits in the more literal sense, based on factual errors in interpreting the record or errors in carrying out arithmetic. In light of the legislative purpose of the statute to "promote judicial economy by avoiding the utilization of the formal appellate process for a minor ministerial act" (*Acosta, supra,* 48 Cal.App.4th at p. 423), the latter interpretation is more reasonable.

We conclude section 1237.1 does not apply to an appeal raising the sole issue of a constitutional challenge to a presentence custody credit statute or statutory scheme. Rather, the general rule applies that a challenge to an unauthorized sentence is never forfeited and the sentence may be corrected at any time. (*Karaman, supra,* 4 Cal.4th at pp. 348–349 & fn. 15.) Robles-Alejo's constitutional challenge to the prospective-only application of the April 2011 amendments to section 4019 is therefore not barred by section 1237.1 or by general forfeiture principles.

B. *Equal Protection*

Robles-Alejo contends that the prospective-only application of the April 2011 amendments to section 4019 violates his right to equal protection of the law.

The version of section 4019 that applied to Robles-Alejo's sentencing provided that a prisoner who was required to register as a sex offender, who was committed for a serious felony, or who had a prior serious or violent felony conviction could have two days deducted from his or her sentence for good behavior and work performance for every six days spent in presentence custody (i.e., every four days in custody would count as six; 2:1 credits). (Former § 4019, subds. (b)–(f).) All other prisoners could have two days deducted for every four days spent in presentence custody (i.e., every two days in custody would count as four; 1:1 credits). (*Ibid.*)[3] Consistent with this version of section

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[3] Former section 4019 provided in relevant part:

"(a) The provisions of this section shall apply in all of the following cases: [¶] . . . [¶] (4) When a prisoner is confined in a county jail, industrial farm, or road camp, or city jail, industrial farm or road camp following arrest and prior to the imposition of sentence for a felony conviction.

"(b)(1) Except as provided in Section 2933.1 and paragraph (2), subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] (2) If the prisoner is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5, subject to the provisions of subdivision (d), for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

"(c)(1) Except as provided in Section 2933.1 and paragraph (2), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] (2) If the prisoner is required to register as a sex

4019, the trial court awarded Robles-Alejo 2:1 conduct credits, or 163 days for his 326 days of presentence custody when it sentenced him in May 2011.[4]

In 2011, the Legislature passed criminal realignment legislation that, inter alia, changed the laws governing presentence custody conduct credits. Under the new legislation, all prisoners can receive 1:1 credits. (§ 4019, subds. (b), (c), as amended by Stats. 2011, ch. 15, § 482.)[5] The legislation expressly provided that this change "shall

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offender pursuant to Chapter 5.5 (commencing with Section 290), was committed for a serious felony, as defined in Section 1192.7, or has a prior conviction for a serious felony, as defined in Section 1192.7, or a violent felony, as defined in Section 667.5, for each six-day period in which the prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless [it] appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] . . . [¶]

"(e) No deduction may be made under this section unless the person is committed for a period of four days or longer, or six days or longer for persons described in paragraph (2) of subdivision (b) or (c).

"(f) It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody, except that a term of six days will be deemed to have been served for every four days spent in actual custody for persons described in paragraph (2) of subdivision (b) or (c)." (Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50.)

[4] Between the time Robles-Alejo committed his crime and the time he was sentenced, sections 2933 and 4019 were amended to preserve the effect of the 2009 amendments to section 4019 on presentence custody conduct credits for state prisoners, but to reinstate the 2:1 conduct credit scheme for all other persons who received conduct credits under section 4019. (Stats. 2010, ch. 426, §§ 1, 2.)

[5] Section 4019 now provides in relevant part: "(b) Subject to the provisions of subdivision (d), for each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has refused to satisfactorily perform labor as assigned by the sheriff, chief of police, or superintendent of an industrial farm or road camp.

"(c) For each four-day period in which a prisoner is confined in or committed to a facility as specified in this section, one day shall be deducted from his or her period of confinement unless it appears by the record that the prisoner has not satisfactorily complied with the reasonable rules and regulations established by the sheriff, chief of police, or superintendent of an industrial farm or road camp. [¶] . . . [¶]

apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h), as added by Stats. 2011, ch. 15, § 482, and amended by Stats. 2011, ch. 39, § 53.) The law took effect on April 4 and became operative October 1. (Stats. 2011, ch. 15, § 636, as amended by Stats. 2011, ch. 39, § 68; Stats. 2011, ch. 15, § 639.) The enactment "addresses the fiscal emergency declared by the Governor by proclamation on January 20, 2011 . . . ." (Stats. 2011, ch. 15, § 638.)

Robles-Alejo argues equal protection principles require us to apply the new legislation retroactively, despite the Legislature's expressed intent that it apply only prospectively, and that he is therefore entitled to an additional 163 days of presentence custody conduct credit. He relies primarily on two prior decisions of our Supreme Court: *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*) [holding that equal protection principles required the retroactive application of a statute that granted felons actual-time credit for the time they spent in presentence custody], and *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) [applying strict scrutiny to the unequal application of conduct credits]. *Brown,* however, has distinguished both *Kapperman* and *Sage* in a context closely similar to that before us.

Consistent with *Brown,* we conclude that rational basis review applies in equal protection challenges to the prospective-only application of ameliorative penal laws and that there is a rational basis for prospective-only application of the April 2011 amendments to section 4019.

"(e) No deduction may be made under this section unless the person is committed for a period of four days or longer.

"(f) It is the intent of the Legislature that if all days are earned under this section, a term of four days will be deemed to have been served for every two days spent in actual custody."

1. *Legislative Intent*

There is at least some ambiguity in the Legislature's prospective-application language. Robles-Alejo argues that the new legislation "applies only to defendants whose crimes were 'committed on or after October 1, 2011.' (§ 4019, subd. (h).)" However, the full language of that subdivision is that the legislation "shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).) *Olague* interprets this language to mean the law applies to all prisoners' presentence custody on or after October 1, 2011.[6] (*Olague, supra,* 205 Cal.App.4th at pp. 1131–1132.) We need not decide this issue because, however the language is interpreted, it bars application of the amendments to Robles-Alejo who both committed his crime and completed his presentence custody before October 1, 2011. We will assume that *Olague*'s interpretation is correct, and will refer hereafter to the amendments' prospective application to time prisoners spent in presentence custody on or after October 1, 2011.

[6] *Olague* reasons as follows: "It is true that after declaring itself to operate 'prospectively,' the . . . amendment declares that it will apply 'to prisoners who are confined . . . for a crime committed on or after October 1, 2011.' (§ 4019, subd. (h).) Standing alone this would indeed suggest a classification based upon the date of the offense. In the next sentence, however, the Legislature declared, 'Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.' (§ 4019, subd. (h).) Of course it would have been impossible to earn days in presentence confinement on an offense which had not yet been committed. This sentence is therefore meaningless unless the liberalized credit scheme applies to crimes committed before the stated date. While the statute may thus seem somewhat self-contradictory, the contradiction is only implied. The ambiguity is best resolved by giving effect to both sentences and concluding that the liberalized scheme applies both to prisoners confined for crimes committed after October 1, 2011, and to prisoners confined after that date for earlier crimes. In this view, the correct classification is between prisoners earning credit for presentence confinement prior to that date and prisoners earning such credit after that date." (*Olague, supra,* 205 Cal.App.4th at pp. 1131–1132.)

2. *Equal Protection Analysis*

In *Brown, supra,* ___ Cal.4th ___, the Supreme Court addressed the 2009 amendment to section 4019 (Stats. 2009, 3d Ex. Sess. 2009–2010, ch. 28, § 50). The 2009 amendment was silent as to any retroactive effect. The Court held that the Legislature intended this amendment to apply prospectively only and that the prospective-only application of the amendment did not violate equal protection. (*Brown, supra,* ___ Cal.4th ___ [pp. 17, 20].) *Brown* controls our equal protection analysis in this matter and dictates the conclusion that the prospective-only application of the April 2011 amendments to section 4019 does not offend due process.

Brown explains: "The concept of equal protection recognizes that persons who are similarly situated with respect to a law's legitimate purposes must be treated equally. (*Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.) Accordingly, ' "[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." ' (*Ibid.*) 'This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged." ' (*Ibid*.)

"As we have already explained, the important correctional purposes of a statute authorizing incentives for good behavior (see *People v. Austin* [(1981)] 30 Cal.3d 155, 163) are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows. On this point we find the decision in [*In re*] *Strick* [(1983)] 148 Cal.App.3d 906, persuasive. In that case . . . the Court of Appeal rejected the claim that an expressly prospective law increasing conduct credits violated equal protection unless applied retroactively to prisoners who had previously earned conduct credits at a lower rate. 'The obvious purpose of the new section,' the court reasoned, 'is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.' (*Strick*, at p. 913.) '[T]his incentive

purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.' (*Ibid*.) 'Thus, inmates were only similarly situated with respect to the purpose of the [new law] on [its effective date], when they were all aware that it was in effect and could choose to modify their behavior accordingly.' (*Ibid*.)

"Defendant and amicus curiae contend this court's decision in [*Sage, supra,*] 26 Cal.3d 498 . . . , implicitly rejected the conclusion the Court of Appeal would later reach in *Strick, supra,* 148 Cal.App.3d 906, that prisoners serving time before and after a conduct credit statute takes effect are not similarly situated. We disagree.

"The defendant in *Sage, supra,* 26 Cal.3d 498, a case decided three years before *Strick, supra,* 148 Cal.App.3d 906, had been committed to the state hospital under the mentally disordered sex offender law [citation] and, after being found not amenable to treatment, sentenced to state prison for a felony. The question before the court was whether the defendant was entitled to conduct credit for the time he had spent in county jail before being sentenced. The version of section 4019 then in effect (§ 4019, as amended by Stats. 1978, ch. 1218, § 1, p. 3941) authorized presentence conduct credit for misdemeanants who later served their sentences in county jail but not for felons who were eventually sentenced to state prison. Finding no 'rational basis for, much less a compelling state interest in, denying presentence conduct credit to detainee/felons' (*Sage*, at p. 508, fn. omitted), the court held the statute's unequal treatment of felons and misdemeanants for this purpose violated equal protection. (*Ibid*.)

"To be sure, one practical effect of *Sage, supra,* 26 Cal.3d 498, was to extend presentence conduct credits retroactively to detainees who did not expect to receive them, and whose good behavior therefore could not have been motivated by the prospect of receiving them. But amicus curiae reads too much into *Sage* by suggesting the opinion thereby implicitly foreclosed the Court of Appeal's later conclusion in *Strick, supra,* 148 Cal.App.3d 906, that prisoners serving time before and after incentives are announced are not similarly situated. The unsigned lead opinion 'by the Court' in *Sage* does not mention the argument that conduct credits, by their nature, must apply prospectively to motivate good behavior. A brief allusion to that argument in a

concurring and dissenting opinion (see *Sage, supra,* at p. 510 (conc. & dis. opn. of Clark, J.)) went unacknowledged and unanswered in the lead opinion. As cases are not authority for propositions not considered (e.g., *People v. Avila* (2006) 38 Cal.4th 491, 566), we decline to read *Sage* for more than it expressly holds.

"Defendant and amicus curiae also contend the present case is controlled by *In re Kapperman, supra,* 11 Cal.3d 542, in which this court concluded that equal protection required the retroactive application of an expressly prospective statute granting credit to felons for time served in local custody before sentencing and commitment to state prison. We disagree. Credit for time served is given without regard to behavior, and thus does not entail the paradoxical consequences of applying retroactively a statute intended to create incentives for good behavior. *Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing conduct credits are similarly situated.

"For these reasons, we conclude that equal protection does not require former section 4019 to be applied retroactively." (*Brown, supra,* ___ Cal.4th ___ [pp. 17–20].)

We see no basis on which *Brown* can be distinguished from the case before us. Like the 2009 amendments at issue in *Brown,* the April 2011 amendments changed the formula for awarding conduct credits, which have an inherently prospective effect by creating an incentive for future good behavior and work participation by inmates. (See also *Olague, supra,* 205 Cal.App.4th at pp. 1132–1133.) Thus, those who enjoy the benefits of the amendments while serving time in presentence custody on or after the operative date of the statute (who are affected by this incentive) are not similarly situated to those denied the benefits of the amendments for periods of time they served in presentence custody before the operative date of the statue (when the incentive was not present). (See *Brown, supra,* ___ Cal.4th ___ [pp. 17–18].) This incentive-creating feature of the law distinguishes this case from *Kapperman,* which involved a statute that granted credit for *actual* time spent in presentence custody. (*Brown, supra,* ___ Cal.4th ___ [pp. 19–20].) *Brown* further instructs that *Sage*'s analysis is distinguishable because that opinion failed to expressly consider the significance of the incentive-creating feature

of the law. (*Brown, supra*, ___ Cal.4th ___ [pp. 18–19].) On its facts, *Sage* is distinguishable because it did not involve the prospective-only application of an ameliorative penal statute, but rather the contemporaneous unequal treatment of misdemeanants and felons with respect to the award of conduct credits for presentence custody. (*Sage, supra*, 26 Cal.3d at pp. 507–508; see also *Olague*, at pp. 1134–1135.)

We conclude the prospective-only application of the April 2011 amendments to section 4019 does not violate due process.

III. DISPOSITION

The judgment is affirmed.

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Bruiniers, J.

We concur:

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Simons, Acting P. J.

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Needham, J.